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IN THE

Supreme Court of the United States

For the October, 1977 Term

No. 77-1[illegible]

ALDENS, INC.,

Petitioner,

v.

BRONSON C. LaFOLLETTE, Individually and as Attorney General for the State of Wisconsin, and ERICH MILDENBERG, Individually, and as Commissioner of Banking for the State of Wisconsin,

Respondents.

MOTION OF DIRECT MAIL/MARKETING ASSOCIATION, INC. TO FILE A BRIEF AS AN *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Direct Mail/Marketing Association, Inc. (DMMA), a New York Not-For-Profit Corporation, is the largest and oldest national trade association serving the vast community involved in direct-to-the-consumer mail advertising and marketing. It hereby moves for leave to file the within brief as an *amicus curiae* since consent to do so has been refused by Bronson C. LaFollette, Esq. and Mr. Erich Mildenberg, respondents herein, although it has been granted by Aldens, Inc. *Amicus* urges the Court to grant Aldens' petition for a writ of certiorari.

Question Presented

May Wisconsin, without violating the due process clause of the fourteenth amendment and the commerce clause of the constitution, impose its own requirements upon a seller whose only connection with that state is through interstate channels of communication and transportation?

Interest of *Amicus Curiae*

Direct mail advertising ranks third as a selling medium, behind newspapers and television. An estimated $5 billion was invested in direct mail in 1976, producing sales of goods and services in excess of $60 billion. Thus, direct mail accounts for an estimated 12 percent of all consumer purchases. Taking into account the various phases of direct mail marketing—creating, printing, distributing and processing advertising, and fulfilling orders generated thereby —one finds that more than one million people depend on direct mail marketing for employment.

DMMA's membership totals more than 1,700 firms, located in 50 states and 30 foreign countries. Members range in size from "Fortune 500" giants to sole practitioners, and represent every functional level of industry—manufacturing, wholesale and retail. As direct mail advertising and marketing techniques are used by each of them as an integral part of conducting their respective businesses, a judicial decision that affects those techniques must and will have a significant and direct impact on DMMA's membership.

Members of DMMA who use direct mail and other direct techniques to market their products or services do so primarily in interstate commerce, most of such activities being on a national basis. Efficiency in doing so, hence ability to

compete with retail outlets, including national or major regional chains, depends upon direct marketers being able to uniformize their operations: the content of their advertising materials; the assemblage, design, componency and packaging of their products; order-handling, fulfillment and delivery systems; invoicing of their wares; and the terms of their credit arrangements. Such standardizations are essential, also, to realization of economies that can be passed on to consumers, thus benefiting them as well as serving the competitive purposes of DMMA's members.

The decision of the Court of Appeals in this case can be explained only on the basis that the police power of a state is so potent that, given the merest scintilla of a nexus to an event, or to a party involved in an event, it virtually *per se* over-rides all considerations of interstate commerce, substantive due process, and even the sovereignty of other states over transactions that are sited in their own jurisdictions.

If that is indeed the state of constitutional law, fifty different jurisdictions stand free to impose fifty irreconcilably different sets of requirements upon direct marketers as to the kinds of products and services they may or may not vend to citizens of the regulating states, what they may or may not say in promoting the sale of such products or services, the terms of sale and credit that can be used, the times within which deliveries must be made, obligations of service, repair or replacement, and whatever other facets of vendor-vendee relationships might be deemed to affect the welfare of the latter (and what would not?) so as to trigger the states' exercise of their police power.

Even under the, so far, most liberal extension of a potentiating nexus for state control of an out-of-state marketer's activity, *National Geographic Society* v. *California Board of Equalization,* U.S. , 97 S. Ct. 1386

(1977),[1] this Court indicated some disaffection for "slightest presence" as an adequate nexus to support state control; actual activity of the company inside the state was made the basis for such jurisdiction.[2]

Relying upon such a constitutional doctrine, direct marketers, including the within petitioner, have trusted in refraining from maintaining offices, sales or other personnel, or performing other activities within most states, other than to address interstate communications and transportations of products to addressees there located, to insulate themselves from the fragmentation of their business activities that a multitude of heterogeneous state laws could produce.

But now the decision below holds that mere use by a seller of such interstate facilities is enough to establish a police power triggering nexus, if only the addressee is a citizen of the state and physically present in it when he orders the interstate marketed merchandise. It holds, in effect, that, given such citizenship and presence of the buyer, his state can declare illegal and forbid a vendor that maintains no presence within its borders from entering into a credit contract which is in all respects valid within the

[1] While the case involved sales and use taxes, the state's control over the company was not to impose liability upon it as a taxpayer, but to require it to perform services for the state in the role of a tax collector. 97 S. Ct. at 1391.

[2] "Our affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional nexus. Appellant's maintenance of two offices in the State and solicitation by employees assigned to those offices of advertising copy in the range of one million dollars annually . . . establish a much more substantial presence than the expression 'slightest presence' connotes. Our affirmance thus rests upon our conclusion that appellant's maintenance of the two offices in California and activities there adequately establishes a relationship or 'nexus' between the Society and the State that renders constitutional the obligations imposed upon appellant . . .". 97 S. Ct. at 1390.

jurisdiction of its consummation; and even though, additionally, the contract is negotiated through interstate channels of communication, and the goods subject to the contract are transported directly to the purchaser in interstate commerce, and the payments, required by the contract are transmitted in interstate commerce.

The obviousness and gravity of that threat to the industry of direct mail advertising and direct marketing plainly explains the interest of DMMA in seeking review by this Court of the decision below.

DMMA urges that the writ be granted and requests that it be given this opportunity to comment as an *amicus curiae* in favor of the petition and, ultimately, on the merits of the case, for it is deeply concerned with the industry-wide effect the Court of Appeals' decision will have if permitted to stand.

Reasons for Granting the Writ

This Court has never held that a state may impose its requirements upon a seller whose only connection with customers in that state is from outside the state by common carrier or the United States mail.

DMMA respectfully submits that a major reason for granting the writ is that the decision below, if allowed to stand following this Court's refusal of a writ in *Aldens, Inc.* v. *Packel,* 425 U.S. 943, may well be anticipated to accelerate a momentum of conformance throughout the circuits, a momentum that will be pernicious if the doctrine the decision supports is an invalid one. Its impacts cannot be other than far-reaching and, if not in truth constitutionally sound, they had best be aborted before their roots pierce deep.

Aldens' petition, at pages 13-25, sets forth adequate reasons why this Court, if it does review the Court of Appeals' determination and opinion, might well be expected to reverse it; certainly Aldens demonstrates minimally that if the result is to be sustained its importance justifies a firmer grounding in constitutional precedent and principle than has yet been put beneath it. We do not need to impose upon this Court's time to repeat what Aldens has written in this regard, but accept and endorse it for DMMA's purposes here.

Respectfully submitted,

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